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In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX REL. ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

RESPONDENT'S ANSWER TO PETITIONS

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BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

RESPONDENT'S ANSWER TO PETITIONS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Albert L. Cox, Brigadier General, United States Army, Provost Marshal of the Military District of Washington, as respondent herein, for answer to the petitions of Ernest Peter Burger, Herbert Hans Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, and Werner Thiel, for writs of habeas corpus directed to this respondent to produce before said court the bodies of said petitioners and to do and perform whatsoever the court may re-

quire to be done in the premises, respectfully represents unto this honorable court:

1. The petitioners are seven of the eight persons who are now on trial before a Military Commission appointed by the President of the United States on July 2, 1942. The other person on trial, not a petitioner, is one George John Dasch. All eight of these men were trained at a sabotage school operated at a place near Berlin, Germany, receiving instruction in the use of explosives and brief instructions in methods of secret writing. On or about May 22, 1942, these eight men were sent from Germany to a seaport in Occupied France. At this seaport, four of them, namely, Burger, Dasch, Heinck, and Quirin boarded a German submarine which proceeded across the Atlantic Ocean to Amagansett Beach, Long Island, in the State of New York. These four men were landed from the submarine in the hours of darkness on or about June 13, 1942, carrying with them a supply of explosives, incendiaries, fuses, and timing devices. While landing they wore the uniforms, or parts of the uniforms, of the German Marine Infantry. They buried these uniforms and their supplies of explosives in the sand at Amagansett Beach, and proceeded in civilian dress to New York City.

2. The other four men, namely, Kerling, Haupt, Neubauer and Thiel, boarded another German submarine at the above-mentioned seaport in occu-

pied France and proceeded thence across the Atlantic Ocean to Ponte Vedra Beach on the coast of Florida. These four men, carrying with them a supply of explosives, incendiaries, fuses, and timing devices, landed on Ponte Vedra Beach during the hours of darkness on or about June 17, 1942. While landing, they wore the uniform caps of the German Marine Infantry. They buried their caps and their supplies of explosives in the sands of Ponte Vedra Beach and proceeded in civilian dress to Jacksonville, Florida. From Jacksonville they went to various points in the United States.

3. All eight of these men were taken into custody by agents of the Federal Bureau of Investigation at various dates between June 19, 1942 and June 27, 1942. Petitioners Haupt and Neubauer were apprehended in Chicago, Illinois, and the other petitioners in New York, N. Y. They all admitted the facts stated in the preceding paragraphs of this answer, and admitted that they had received instructions from Lieutenant Walter Kappe of the German High Command to sabotage and destroy war industries and war facilities in the United States, for which activities they or their relatives in Germany were to receive salary payments from the German Government. They further admitted that they had been paid by the German Government during their course of training at the sabotage school, and they had received substantial sums in American currency from the

German Government before boarding the submarines on which they crossed the ocean. This currency was in their possession when they were apprehended, and was identified by them as the currency they had been given by Lieutenant Walter Kappe of the German High Command. They further admitted they were instructed by Lieutenant Kappe to wear their German Marine Infantry uniforms while landing, and some have testified that they were told that if caught while landing, they would be treated as prisoners of war.

On July 2, 1942, the President of the United States, as President and Commander in Chief of the Army and Navy, issued a precept, a copy of which is attached to each of the petitions as Exhibit A, appointing a Military Commission to try these eight men for offenses against the Law of War and the Articles of War. The Commission so appointed is composed of Major General Frank R. McCoy, President, Major General Walter S. Grant, Major General Blanton Winship, Major General Lorenzo D. Gasser, Brigadier General Guy V. Henry, Brigadier General John T. Lewis, and Brigadier General John T. Kennedy. By the same precept, the Attorney General of the United States and the Judge Advocate General of the Army were directed to conduct the prosecution of all eight of the accused persons.

On the same date and in the same precept the President of the United States appointed Colonel

Cassius M. Dowell and Colonel Kenneth Royall as counsel to defend the petitioners, and subsequent thereto, on or about July 6th, Colonel Carl M. Ristine was specially appointed as defense counsel for George John Dasch, one of the accused, not a petitioner here. The officers above mentioned entered upon their duties promptly upon their appointment and since that time have continuously been in the performance of such duties in defending the accused persons.

On July 2, 1942, the President under the seal of the United States issued a proclamation, a true copy of which is attached to each of the petitions as Exhibit B, denying access to our civil courts to certain enemies of the United States.

4. On July 3, 1942, each of the accused was served with and received in person a copy of certain charges and specifications preferred against him under the Law of War and the Articles of War. These charges and specifications were executed under oath by H. Granville Munson, Colonel, U. S. Army, as accuser, and duly subscribed and sworn to by him before Major General Myron C. Cramer, the Judge Advocate General of the Army. A copy of these charges and specifications is attached to each of the petitions as Exhibit E.

5. The Military Commission appointed by the President met on July 8, 1942, in the City of Washington, District of Columbia, as directed in the precept referred to above, and began the trial of the eight persons so accused.

6. The prosecution presented evidence against the accused, totalling some 1,500 pages in the record of the proceedings, and introduced 259 exhibits, including the boxes of explosives and their contents, the uniforms, currency and other articles identified by the accused. The case for the prosecution occupied some ten days in its presentation. Opportunity was given to the defense counsel to cross-examine the prosecution's witnesses, and full opportunity for argument was given to defense counsel upon every ruling of the Commission. Prior to July 8, 1942, each of the accused had signed one or more written statements outlining the training he had received at the sabotage school, describing his trip by submarine, and outlining his actions in the United States after landing. These statements were introduced in evidence by the prosecution. With reference to their course of training, their trips, and their landings in the United States, there is no substantial point of contradiction in the stories told by the eight accused.

Both prosecution and accused have offered all of their evidence and have so stipulated on the record before the Commission.

7. All of the accused persons contend that they had no intention to obey the orders given them as heretofore set forth. The Military Commission received evidence offered by such defendants, including the voluntarily offered testimony

of each of the accused, in an effort on their part to establish lack of intent.

8. The eight persons accused passed through the defense lines of the United States and landed on our coasts as set forth above. The eastern coast of the United States, including Long Island and Florida, is a defense command and part of the theatre of operations of the United States armed forces, and the beaches on which the petitioners landed were at that time patrolled by the Coast Guard (at Amagansett) and the Army (at Ponte Vedra) for the purpose, *inter alia,* of detecting landings of enemy agents from submarines. At sea, this coast is guarded by the United States Navy.

9. The charges and specifications served on the accused as heretofore set forth enumerate various offenses against the Law of War and the Articles of War. Whether the accused have violated the criminal statutes of the United States is immaterial and irrelevant. They have been charged and are being tried before a military commission for offenses properly cognizable by such a commission.

10. For specific answer to paragraph 3 of each of the petitions, respondent denies that the causes and pretexts of the detention of the petitioners are those set forth in said paragraph, but alleges that he holds the petitioners under authority of a certain order from the Secretary of War dated July 3, 1942, directing the respondent, in his official

capacity, to take, receive, and keep in custody until further orders, said petitioners, by virtue of which order said petitioners were placed in confinement by this respondent and have so been kept in such confinement since the date of said order, and by reason of the facts and authorizations hereinafter particularly set forth.

11. Custody of the eight accused was transferred to this respondent by the Federal Bureau of Investigation on July 1, 1942, pursuant to a directive of the Attorney General signed on July 3, 1942, a copy of which is attached to each of the petitions as Exhibit C. The respondent was ordered to receive and keep said persons in custody by the Secretary of War. A copy of this order is attached to each of the petitions as Exhibit D. The respondent now holds by virtue and authority of the last-mentioned order the eight persons accused, for trial before the Military Commission above described, and produces them at all proceedings before said Military Commission, at which all said persons have been present. Each of the accused thus has heard all of the evidence presented against him. Each of the accused is permitted to confer with his counsel, and his counsel have been permitted to confer with witnesses for the prosecution, during the trial and at other times.

12. Respondent admits that the civil courts of the United States are open and functioning. He also admits that the original arrest of the eight accused was made by the Federal Bureau

of Investigation, and that each of the accused signed certain waivers, copies of which are attached to each of the petitions as Exhibits F, G, and H.

13. The petitioner Burger was born in Germany in 1906. He entered the United States with a German passport on an immigration quota visa in 1927. He filed a declaration of intention to become a citizen later in that year. A certificate of citizenship was issued to him in 1933. Four or five months thereafter he returned to Germany with an American passport, and remained there until he left for this country on the submarine which landed at Long Island on June 13, 1942.

Burger joined the German Army as a private on August 7, 1941, and at that time took an oath of loyalty to Adolf Hitler, Chancellor of the German Reich. He remained in the military service of the German Reich when he entered the sabotage school, and he is still a member of the German Army.

14. The petitioner Haupt was born in Germany in 1919. His father, also of German birth, came to this country in 1923 under an immigration visa. The father filed a declaration of intention to become a citizen in that year. Herbert Haupt entered the United States with his mother in 1925. His father became a naturalized citizen in 1930. Haupt remained in the United States until June 1941, at which time he went to Mexico. He sought to obtain an American passport for this trip but was not able to obtain one. He went to Mexico,

he says, because of personal difficulties and because he wished to obtain work in Mexico or Nicaragua. After staying five or six weeks in Mexico, he attempted to obtain permission to go to Guatemala or Nicaragua, but was not able to obtain such permission. Not having ample funds and not being able to obtain work in Mexico he went to the German Consul in Mexico City for assistance. The consul advised him that he could obtain employment under German auspices in Japan. He thereupon sailed in July or August 1941 from Mexico to Japan, traveling on a Japanese vessel at the expense of the German Government, and carrying a German passport. After a short stay in Japan, he was given employment on a German vessel. He states that the destination was not revealed to him at the time he started service. At sea he transhipped to another German vessel, which ran the blockade and landed at Bordeaux, France, in December 1941. Haupt states that he was not told of the destination of this second vessel until he had been at sea on it for some days. Haupt proceeded from Bordeaux to Stettin, Germany. He received the Iron Cross, second class, from the German Government for his service on the vessel, as he had been helpful in aiding it to run the blockade. He also received another decoration from the German Government at about the same time.

He states that he was not allowed to obtain gainful employment in Germany, and that when, sometime in March 1942, he was offered an opportunity to join the sabotage school maintained by Lieutenant Walter Kappe of the German High Command, he accepted the offer. He claims that he did so with the intention of coming back to the United States, and that he did not intend to go through with any attempts at sabotage in this country.

He stated that while on the submarine he decided to inform the American authorities about the mission of the eight accused and their arrival and whereabouts in this country. He landed on June 17, 1942, and proceeded to Chicago. On June 22, he called at the offices of the Federal Bureau of Investigation in Chicago and explained to them that he had not yet registered for the draft because he had been in Mexico for the past year. He admits that he lied in so stating, and that he did not tell the Bureau that he had been in Japan or Germany. He states he did not inform the Bureau about the mission of the eight accused at this time because he was nervous and afraid, and wanted to think things over. He stated that he intended to inform the Bureau after July 6, 1942, when Dasch and the petitioner Kerling were to meet in Chicago, but he was apprehended by the Bureau on June 27, 1942. He admits he saw at least six people in Chicago,

including his father, mother, uncle, and aunt, all of whom knew he had just returned from Germany aboard a submarine with others, but admits he told none of them of his intention to inform the authorities.

The petitioner, Burger, testifying on his own behalf before the Military Commission, stated on cross examination that he was told by Lieutenant Walter Kappe of the German High Command, who recruited and supervised the training and departure of the eight accused, that each of the accused was assigned to a German Army unit before his departure.

15. The petitioners, Burger and Haupt, for the reasons stated in the foregoing paragraphs, are not citizens of the United States. By their entire course of conduct Burger and Haupt have forfeited any claim to American citizenship and must be treated as subjects of the German Reich and, in any event, as enemies of the United States.

16. Respondent admits that on July 28, 1942, the petitioners applied to the Honorable James W. Morris, Associate Justice of the United States District Court for the District of Columbia, for leave to file petitions for writs of habeas corpus, and that, on the same day, by orders attached to each of the petitions presented to this Court, the applications to Judge Morris were denied, for the reasons stated in said orders.

17. Respondent denies the allegations contained in paragraphs 1 to 5 (j), both inclusive, in Burger's and Haupt's petitions, and those contained in paragraphs 1 to 5 (k), both inclusive, of the other petitions, except to the extent that any of these allegations are specifically admitted in the preceding paragraphs of this answer. As to paragraph 5 (k) of Burger's and Haupt's petitions, and paragraph 5 (l) of the other petitions, the respondent has no knowledge or information sufficient whereon to base an answer, and therefore neither admits nor denies the allegations contained therein.

18. Respondent asks that paragraph 5 of the petitions be rejected in its entirety, for the following reasons:

(a) Except as set forth in paragraphs 1–16, of this answer, it contained no allegations of fact that may not be judicially noticed by the court;

(b) It alleges numerous unfounded conclusions of law, which are answered fully in respondent's brief;

(c) It presents a case by its terms arising "in the land or naval forces" within the meaning of the Fifth Amendment to the United States Constitution;

(d) It raises numerous questions concerning the admissibility and sufficiency of the evidence pre-

sented to the Military Commission, which are matters solely for the determination of that body.

19. The respondent, further answering, says that the petitions should be rejected in their entirety for the following reasons:

(a) The petitioners have no capacity to sue in this Court or in any other court;

(b) The petitioners are enemies of the United States and are without any right, standing, or capacity to sue in this Court for a writ of habeas corpus or other relief;

(c) The petitioners, having entered service of a nation with which the United States is at war, having taken up arms against the United States, and having as part of a hostile force, invaded the United States and waged war on the United States, as more fully appears from the petitions and exhibits attached thereto, have no right to maintain their petitions for a writ of habeas corpus and have no capacity to maintain any action or suit in the courts of the United States;

(d) The petitions state no grounds for the release of the petitioners from the custody of respondent;

(e) This Court is without jurisdiction to disturb the respondent in his right to lawful custody of the petitioners vested in him by virtue of the laws of war and the lawful orders of his superiors;

(f) This Court is without jurisdiction to interfere with the due and orderly proceedings of the

Military Commission duly constituted by the President of the United States of America and Commander in Chief of its armed forces to inquire into the hostile acts committed by the petitioners as enemies of the United States within a zone of military operations in time of war in violation of the laws of war and the Articles of War;

(g) The Military Commission has jurisdiction over the persons of the petitioners and the offenses charged in the charges and specifications above referred to, and is legally convened and legally constituted;

(h) There has been no denial to the petitioners of any right to which they are entitled under the Constitution or laws of the United States.

WHEREFORE, having answered all and singular the matters and things presented to this honorable Court by the said petitions upon which are involved any issues of fact, said facts being uncontroverted; and having represented unto this honorable Court adequate reasons in law to justify the propriety of the confinement of said petitioners and the jurisdiction of the said Military Commission over their persons, and over the offenses with which they stand charged, and having established the legality of the appointment, constitution and proceedings of said Military Commission as a matter of law,

respondent prays that said petitions be hence dismissed.

Respectfully submitted,

ALBERT L. COX,
Brig. Gen., U. S. A.,
Provost Marshal of the Military
District of Washington,
Respondent.

FRANCIS BIDDLE,
Attorney General.

MAJ. GEN. MYRON C. CRAMER, U. S. A.,
The Judge Advocate General,
Attorneys for the Respondent.

OSCAR COX,
Assistant Solicitor General,

COL. ERWIN M. TREUSCH, U. S. A.,
GEORGE THOMAS WASHINGTON,
ROBERT S. STEVENS,
MYRES S. MCDOUGAL,
LLOYD N. CUTLER,
Of Counsel.

JULY 29, 1942.

UNITED STATES OF AMERICA,
District of Columbia, ss:

On the 29th day of July, 1942, before me, the undersigned, authorized by law to administer oaths, personally appeared Albert L. Cox, Brigadier General, U. S. A., Provost Marshal of the Military District of Washington, and made oath that he is the respondent referred to in the foregoing answer, that he has read and understands said answer, and has personally signed the same, and says that the said answer is true in substance and in fact.

_____ _____,
Notary Public, D. C.

My commission expires _____.

U. S. GOVERNMENT PRINTING OFFICE: 1942